



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Aerial Machine & Tool Corporation
File: B-234052
Date: January 13, 1989

DIGEST

1. Bid submitted in response to a total small business set-aside which failed to certify that all end items will be manufactured or produced by small business concerns properly was rejected as nonresponsive.
2. Generally, completion of the Place of Performance clause relates to the responsibility of a bidder and not the responsiveness of a bid; therefore completion of the clause does not cure failure to certify that all end items will be manufactured or produced by a small business.
3. Post-bid opening explanations of a bidder's intent cannot be used to make a nonresponsive bid responsive even if the government would obtain a lower price by waiving the deficiency or permitting the bidder to cure it.

DECISION

Aerial Machine & Tool Corporation protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DLA500-88-B-0659, a total small business set-aside issued by the Defense Industrial Supply Center (DISC) for harness assemblies. DISC rejected the bid because Aerial did not complete the IFB's Small Business Concern Representation provision.

We dismiss the protest without obtaining an agency report since it is clear from the record that the protest is without legal merit. 4 C.F.R. § 21.3(m) (1988).

The Small Business Concern Representation provision requires a bidder to certify whether it is a small business concern and whether all of the supplies to be furnished will be manufactured or produced by a small business concern in the United States, its possessions, or Puerto Rico. Aerial indicated in its bid that it was a small business concern,

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but failed to certify that all end items will be manufactured or produced by a small business.

Aerial argues that its failure to make the required certification was a minor irregularity and an apparent clerical mistake which the agency could either waive or correct under Federal Acquisition Regulations § 14.405 or § 14.406, especially since Aerial had indicated in its bid's Place of Performance clause that Aerial itself would manufacture, inspect, pack and ship the supplies from its own facilities and this arrangement had been confirmed during the pre-award survey. Aerial also states that had the agency asked Aerial to clarify the omission after bid opening it would have done so.

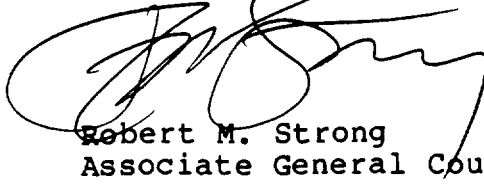
Where a bid on a small business set-aside omits the certification in issue it is viewed as failing to establish the bidder's legal obligation to furnish end items manufactured or produced by a small business concern, and the bid must be rejected as nonresponsive. Otherwise, the small business contractor would be free to provide the end items from either small or large businesses as its own interests might dictate, thus defeating the purpose of the set-aside program. Rocco Industries, Inc., B-227636, July 24, 1987, 87-2 CPD ¶ 87.

In addition, we have specifically held that completion of the Place of Performance clause cannot be used to cure a bid that is nonresponsive to the small business product requirement. Delta Concepts, Inc., B-230632, July 13, 1988, 67 Comp. Gen. _____, 88-1 CPD ¶ 43. For the reasons stated in that decision, we concluded that a bidder's compliance with solicitation instructions concerning the Place of Performance clause is not related to what the bidder is obligating itself to do through the submission of its bid. We do not think a bidder assumes an obligation to furnish a product manufactured by a small business merely by virtue of listing a small business concern in the Place of Performance clause. Delta Concepts, Inc., 67 Comp. Gen. at _____, 88-2 CPD ¶ 43 at 3-4.

Finally, post-bid opening explanations cannot be used to make a nonresponsive bid responsive even if, as here, the government could obtain a lower price by accepting the corrected bid. Hanson Industrial Products, B-218723 et al., May 9, 1985, 85-1 CPD ¶ 521. Therefore, since Aerial's bid

was nonresponsive on its face, its post-bid opening explanation of what it actually intended may not be considered.

The protest is dismissed.



Robert M. Strong
Associate General Counsel